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No. 84-1385

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

WILLIAM ALLEN WRIGHT - - - Petitioner

versus

AL PARKE, WARDEN - - - - Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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May 3, 1985

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Whether This Court is Precluded From Considering Questions of Admissibility of Certain Hearsay Statements Where Prior Courts Reviewing the Entire Record Found This Evidence was Admitted at Petitioner's Insistence or Without any Contemporaneous Objection as Required by *Wainwright v. Sykes.*

II. Whether Petitioner's Right to Confrontation was Violated by Admission of the Victim's Excited Utterances Following the Crime.

III. Whether This Court Lacks Jurisdiction to Consider Argued Limitations on the Right of Self-Representation When This Issue Has Not Been Raised by Petitioner in any State or Federal Court.

IV. Alternatively, Whether a State Court is Obligated by Due Process to Deny a Defendant's Right to Represent Himself Because the Defendant's Strategy Appears Unwise.

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinions below are correctly set forth in petitioner's Appendices.

JURISDICTION

Respondent respectfully disagrees with the inference in petitioner's jurisdictional statement that the claims presented here were "asserted below." Petitioner did raise in state and federal court the claim that he was denied his right of confrontation by the admission of the deceased victim's *res gestae* statements on the day of the crime, May 9. However, United States District Judge Thomas A. Ballantine, Jr., held this claim presented merely a question of

state evidentiary law and that the statements were admissible under Kentucky law. (Petitioner's Appendix B, p. 6b.) As to any other statements of the victim, the courts below held that these statements were admitted with petitioner's agreement or urging and/or that no constitutional question is presented under the totality of the circumstances of trial.

Petitioner boldly asserts that the decisions of the lower courts "that petitioner, by his self-misrepresentation, brought the error and its consequences upon himself, has raised an issue as to whether, and to what extent, the due process clause permits the conviction of a *pro se* defendant which occurs as the result of his mis-representation" (Petition, p. 11). Petitioner, however, fails to advise this Court that he has never challenged the validity of his waiver in any lower court nor has he ever asserted the new claim that there are due process limits on the right of self-representation.

Petitioner's jurisdictional statement is totally devoid of the requirements of 28 U.S.C. §1257(3) and the mandates of Rule 21.1(h). Petitioner has not and cannot specify where in the lower courts any federal questions were raised, the method of raising them and the way they were passed upon by the court. Petitioner's attempt to bootstrap the issue demonstrates his inability to show the federal questions were "timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari." Rule 21.1(h).

Respondent further notes that the decisions below turn on the "extraordinary circumstances" of the case and any decision by this Court would affect only petitioner. The purpose of review by writ of certiorari is not to give the defeated party another hearing. The petition for writ of certiorari should be denied.

Respondent addresses the jurisdictional issues in greater detail below and, alternatively, responds briefly on the merits in the event this Court should disagree that it lacks jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner correctly quotes the constitutional provisions he alleges are involved in this petition. Respondent respectfully disagrees that any constitutional issue is properly before this Court.

COUNTERSTATEMENT OF THE CASE

A. Trial Testimony and Proceedings

William Allen Wright chose to represent himself at trial and insisted repeatedly that he was familiar with the law and did not want counsel to interfere with his right to represent himself or to make his own strategic decisions. The trial record reflects petitioner had changed counsel four times prior to requesting permission to proceed *pro se* (TH 1/8/82, pp. 2-3). A public defender, the Honorable Franklin P. Jewell, was appointed as advisory counsel. Wright and the advisory counsel signed a document setting out the responsibilities of the public defender. This document provided that at trial "where there was a conflict be-

tween Wright and the public defender on Wright's theory of the case and objection to evidence, a decision by Wright to waive an objection would appear on the record." (Slip Opinion, Supreme Court of Kentucky, p. 1.)

Evidence at trial was introduced as follows:

Lenore Anderson, Debra Anderson's mother, testified she received a phone call from her daughter at approximately 4:45 p.m. on May 9, 1980, during which Debra seemed "terribly, terribly upset," reported a man had come to her apartment and "hurt" her, and asked her parents to "just come quickly." (TE 101, pp. 106, 113, 121-122.) Mr. and Mrs. Anderson drove immediately to the apartment and called the police and Emergency Medical Service [EMS] as soon as they observed their daughter's condition (TE 101, pp. 122-124, 148, 169-170). Debra had three or four slash marks on each wrist which required approximately forty stitches (TE 101, p. 124; TE 102, pp. 225-226).

Richard Anderson, the victim's father, testified that Debra was "very, very upset" when they arrived (TE 101, pp. 170, 175).

Her parents related her statements that "a man" was apparently in her apartment when she arrived and that "he" grabbed her from a doorway as she walked down the hall (TE 101, pp. 127, 170). She was pulled into the bedroom where her attacker strapped her to the bed and unsuccessfully attempted to receive sexual gratification through oral sodomy (TE 101, pp. 127, 170-171, 190-196). He then became angry and left the

room (*Id.*). Debra heard the kitchen knife sharpener in operation and then her attacker returned with a knife and cut her wrists saying, "I'm going to make this look like suicide." (*Id.*) She said when the phone rang few minutes later, he shook his head as though in a trance and removed the straps and left (TE 101, pp. 128, 194). Debra told her parents she locked the door and called them immediately (*Id.*). Upon their arrival they observed the bedroom in disarray, blood on the bed, a lamp on the floor, and a paring knife in the corner (TE 101, pp. 125, 171-172). On cross-examination, Lenore Anderson stated Debra may have had a couple of glasses of wine on May 9 (TE 101, pp. 155-158).

When the police arrived, Debra and her parents were interviewed separately (TE 101, pp. 129, 189). Following the interviews and EMS treatment of the wounds, Mr. and Mrs. Anderson took Debra to the hospital emergency room where they stayed from approximately 7 p.m. to 11 p.m. (TE 101, pp. 130-132, 152, 173-174, 186).

Police Officer Meyer was the first Jefferson County Police Officer on the scene and obtained a report of the incident as well as a description of the unknown assailant (TE 102, pp. 207-209). She testified she had difficulty locating the apartment and finally sought assistance from the apartment manager, who accompanied her to the scene (TE 102, p. 207). Officer Meyer described the victim as "very distraught" and obviously suffering from a "very emotional experience" (TE 102, p. 210). On cross-examination

Officer Meyer responded, "She was very convincing." "I don't think she was acting. She was too upset to be acting." (TE 102, p. 218.)

Detective Walter Tangle testified he arrived at the scene at approximately 6:35 p.m. and found the victim in an "upset, highly emotional state" (TE 102, pp. 256-257). He talked with her out of the presence of others and received a substantially identical report of the attack and description of the assailant (TE 102, pp. 257-258, 269-270). Detective Tangle identified photographs of the victim, her wounds, and the scene taken upon arrival (TE 102, pp. 261-268). He testified the victim appeared to have been drinking and that the investigation was left open as a "cutting" since it was possible the wounds were self-inflicted (TE 102, pp. 270-272).

Dr. Harvey Mark Diamond, who treated Debra Anderson in the hospital emergency room, testified she had three or four lacerations on each wrist which he closed with thirty-nine stitches (TE 102, pp. 223, 225-226). The cuts were described as very smooth and straight, all exactly to the same depth, with no evidence of hesitation marks; they were not typical suicide wounds (TE 102, pp. 227-228). He indicated it would be very difficult to self-inflict such wounds (TE 102, p. 227). On cross-examination Dr. Diamond expressed the opinion Ms. Anderson had not attempted suicide and said she "looked more like somebody who had been molested than somebody who had been suicidal." (TE 102, pp. 236, 243.) He described her appearance at the hospital as "very upset," "very disheveled . . .

makeup all a mess . . . hair all undone" (TE 102, pp. 239-240).

During Lenore Anderson's testimony, advisory counsel objected to hearsay testimony of Debra Anderson's statements but was overruled based on *Preston* v. *Commonwealth,* Ky., 406 S. W. 2d 398 (1966). (TE 101, pp. 113-120.) A continuing objection was noted at the conclusion of Richard Anderson's testimony (TE 101, pp. 203-204). Prior to trial counsel agreed that Debra Anderson was "deceased." The jury was so advised but none of the details of her death were disclosed.

Prior to trial advisory counsel also moved to exclude testimony concerning the identification made by Debra Anderson of petitioner as the attacker; however, this motion was withdrawn the morning of trial at petitioner's request since it conflicted with "his theory of the case and the evidence he wishes to present" (TE 101, pp. 98-99). When evidence of the identification was to be introduced, petitioner again affirmatively waived his objections (TE 102, pp. 273-277, 279). The apartment manager, Sarah Eddy, testified at trial that she accompanied Officer Meyer to the scene Friday, May 9, and overheard Ms. Anderson's description of the attacker (TE 96, pp. 249-254). Ms. Eddy described the victim as in a "very upset state" (*Id.,* p. 253). Ms. Eddy returned to her office, called her supervisors to report that the victim's description fit an apartment resident named William Allen Wright, and then provided this information to the police on Monday (*Id.,* pp. 254-257). Detective Tangle testified he received

this information when he returned to work on Wednesday, May 14; he contacted Ms. Eddy, prepared a photo pack containing petitioner's photograph and those of six persons with similar characteristics, and showed the photo pack to Ms. Anderson on May 15 (TE 102, pp. 277-279: TE 96, pp. 8, 65-66). Ms. Anderson immediately and unequivocally identified petitioner from the photo pack (*Id.*). Ms. Anderson was not aware of petitioner's name or that he was an apartment resident until advised that day by Officer Tangle (TE 96, pp. 66-69). An arrest warrant and search warrant were prepared May 16 (TE 96, pp. 9-10).

Ms. Anderson told Officer Meyer her attacker was dressed in khaki pants and a navy shirt (TE 102, p. 209). In petitioner's statement to the police on June 11, 1980, he volunteered that he never in his life wore a dark blue shirt and khaki pants but he had difficulty recalling how he learned these items of clothing were significant (TR 916, pp. 28A-29). Becky Johnson, who petitioner admitted was with him the afternoon of May 9, testified petitioner was dressed in "khaki jeans, canvas shoes and ā navy blue shirt." (TE 94, p. 18.)

Lenore and Richard Anderson also testified that their daughter arrived late for work on July 15, 1980, and appeared "absolutely overwrought," "scared to death" and "very distraught" (TE 101, p. 134; TE 102, p. 174). Debra told them that petitioner pulled behind her on her way to work from her parents' house where she had been staying, and followed her all the way to the office parking lot (TE 101, pp. 133-135; TE

102, pp. 174-175). Debra observed petitioner's Cadillac and a person behind the wheel with the same beard, glasses and cap (*Id.*). This incident was reported to Sgt. William Howard who testified he assisted Debra Anderson in the preparation of an affidavit the morning of July 15 (TE 95, pp. 320-323). He was called again that evening; received additional information, which he investigated; and then he presented the facts to a Grand Jury the morning of July 16 (TE 95, pp. 321-323).

Margaret Fisher, a part-time model for the Adams Agency, testified she and Debra went to a restaurant named Amy's after work on July 15 (TE 99, pp. 124-125). Shortly after they arrived, petitioner entered the restaurant and stood "peering" over them from the bar located on a raised level immediately adjacent to their table (TE 99, pp. 125-126, 130-131). Ms. Fisher stated there were no other people in the area and they were immediately aware of his presence (TE 99, p. 125). Debra became extremely uncomfortable and attempted to leave, at which point petitioner commented they should not leave on his account (*Id.*, p. 126). Ms. Fisher and Debra walked outside and observed only three cars on the whole block, two of them belonging to the two women, and a third car, the same type as petitioner's, parked right in front of them (TE 95, pp. 127, 133). Ms. Fisher said Debra was very upset and shaken by the incident; Ms. Fisher called Debra's parents, and they called the police (TE 95, p. 127). On cross-examination Ms. Fisher responded she

felt petitioner's conduct and comments to be a threat (*Id.*, p. 129).

Lieutenant Robert Ray testified petitioner pulled him over at the entrance of the La Fontennay Apartments shortly after 10:00 a.m. on Thursday, July 15 (TE 99, pp. 140-141). Petitioner identified himself and said he was "the one that some chick has accused of sodomizing" (*Id.*, p. 141). Petitioner then said he received an anonymous call telling him if he came to the corner in five minutes they were going to do him "some harm" (*Id.*, pp. 141-142). Petitioner was asked if persons in a nearby shopping center may have made the call but, without indicating he had seen it, petitioner said no (*Id.*, p. 142). While Lt. Ray looked about the area for a car that may have been involved in the threat, petitioner "tried to get back and start talking about the case he had been accused in" (*Id.*). Lt. Ray explained he was not interested and suggested contacting the detectives involved (*Id.*, pp. 142-143). Then petitioner remarked: ". . . . I've been misidentified. He said, they keep misidentifying me. He said, but it's not going to happen again." (*Id.*) Petitioner lifted his hat, ran his fingers through his hair, and repeated, ". . . . it's just not going to happen again."

Michael Grosso testified he was sitting at a table at Captain's Quarters with a group of friends in mid-July (TE 95, pp. 304-305). Mr. Grosso is in the advertising business and was in a position to direct business toward the Alex Adams Agency in which Debra Anderson had an ownership interest and served as president (TE 95, pp. 301-302; 101, pp. 108-111).

Mr. Grosso's date that evening was Carole Nussbaum, a model for the Alex Adams Agency (TE 95, pp. 311, 313). They were accompanied by Steve Bass, also in the advertising business, and his date Scarlett, both of whom were acquainted with the victim (*Id.*). A third couple was also present but their relationship to the victim was not specified (*Id.*). Petitioner approached the group; asked if anyone knew the victim; and after receiving an affirmative response, began talking about "what was going on with Debra" (TE 95, pp. 305-307). Petitioner then stated the allegations were not true and "that maybe somebody should try and tell her that — convince her that it's not true or something" (*Id.*, p. 307). The witness said he is 6'9", is frequently approached by strangers, and paid little attention to the conversation (TE 95, p. 305). He did not recall petitioner threatening the group but particularly remembered how everyone regarded the incident as very strange (TE 95, pp. 305, 307, 313).

A major prong of petitioner's trial strategy, as reflected in his closing argument, was to attack the credibility of the victim and her identification of him as her assailant (TE 100, pp. 281-313). Important to this attack was evidence that on July 15, 1980, while the victim claimed petitioner was following her, he was several miles away talking to a police officer. A second prong of petitioner's strategy was to portray himself as a victim of harassment by the prosecution and police (TE Pretrial Hearing ["PTH"], pp. 23-25; 96, pp. 32, 69-72, 102-105, 139).

During cross-examination of the investigating officer, Detective Tangle, petitioner established the police subsequently learned that the victim's identification of the person following her on July 15 may have been mistaken (TE 95, pp. 243-244, 246). Advisory counsel recommended petitioner cease the questioning at this point (TE 95, p. 247), but instead petitioner extensively cross-examined this witness concerning the July 16 separate indictment for intimidating a witness and the victim's affidavit submitted to the Grand Jury (TE 95, pp. 246-273). Against counsel's advice, petitioner chose to bring in Debra Anderson's July 15 affidavit (TE 95, pp. 250-252). He specifically asked that the affidavit be read to the jury (TE 95, pp. 256-257) and then asked whether he was indicted for following her or having someone who looks like him follow her (TE 95, p. 272).

When Sergeant Howard, who prepared the affidavit and presented it to the Grand Jury, was asked by the prosecution to read the indictment language, petitioner made no objection but asked the court to admonish the jury that the indictment had no evidentiary value (TE 95, p. 319). The admonition was promptly given (*Id.*). No objection was made when the affidavit and indictment were marked as exhibits (TE 95, pp. 315-316, 318). Nor was any objection made earlier when the court granted the prosecution's request to apprise the jury of the language of the indictment (TE 95, p. 268). When the prosecution asked that the documents themselves be introduced, petitioner objected on the ground that the information was

already before the jury (TE 95, pp. 324-325). The jury was instructed pursuant to RCr 9.56 that "the indictment shall not be considered as evidence or as having any weight against him" (TR New, p. 169).

The May 22 detailed statement and answers of Debra Anderson were initially called to the attention of the jury by petitioner despite strong warnings by the court and advisory counsel and were admitted into evidence after petitioner waived any objections (TE 96, pp. 120-123, 129-138, 176-195; TE 99, pp. 68-69, 82, 88).

Petitioner presented in his defense the testimony of Rebecca and Steve Moore who lived next door to the victim and did not hear screaming or a commotion in the victim's apartment the evening of May 9, 1980 (T 94, pp. 120-122, 141-144). Steve Moore stated he came home at 4:15 p.m. and that he thought they stayed home that evening but was not positive (TE 94, pp. 142-144). Likewise, Rebecca Moore could not recall if they went out that evening but said, if they did, it would have been after her husband showered after work (TE 94, pp. 123, 126). The testimony also revealed the apartment bedrooms were separated by adjacent baths and closets on each side of the dividing wall (TE 94, p. 152).

Petitioner also offered the testimony of Claire Heller, a thirteen-year-old, whom petitioner and his friends picked up on a corner at 2:45 p.m. on May 9 and who rode with them to the post office while he mailed a letter (TE 100, pp. 216-217). Ms. Heller said they returned to petitioner's apartment for awhile and

then he drove her home around 5:30 p.m. (*Id.*). She acknowledged on cross-examination that they drank beer and smoked some marijuana during this time (TE 100, pp. 221-222). Two post office employees recalled seeing petitioner in the post office on several occasions and acknowledged that an envelope offered into evidence was postmarked May 9. 1980 (TE 100, pp. 190, 193, 198, 200).

Petitioner recalled Lenore Anderson for the defense against advisory counsel's objections (TE 100, pp. 242-243). Mrs. Anderson said she smelled wine on her daughter's breath on May 9 and that she was a social drinker but did not have a drinking problem (TE 100, pp. 244-245, 248-249). Mrs. Anderson also stated Debra agreed, at her mother's request, to visit once with a family friend who was a psychiatrist and whom Mrs. Anderson thought might lead her daughter to Christ (TE 100, pp. 249-254).

During the persistent felon stage of the proceedings the Commonwealth introduced evidence of petitioner's prior convictions for escape from a reformatory in 1951, interstate transportation of falsely made securities in 1964, unlawful transportation out of state in 1965, and carrying a concealed deadly weapon in 1975. Petitioner received a five-year sentence, probated for five years, with a standard discharge date of October 14, 1980 (TE PFO, pp. 45-51, 99-100). The probation officer's records did not reflect that petitioner had been discharged (TE PFO, p. 100). For this stage of the trial, petitioner was represented throughout by retained counsel, the Honorable Thomas E. Clay.

The jury, after finding petitioner guilty of sodomy, burglary, assault, and intimidating a witness, also found petitioner guilty as a first-degree persistent felon and recommended a total sentence of sixty-six years (TE 100, pp. 348-349; TE PFO, p. 157; TR New, pp. 194-201).

Post-Conviction Proceedings

On direct appeal to the Supreme Court of Kentucky, petitioner was represented by new retained counsel, the Honorable Steven D. Yater, who raised nine issues, including claims that certain of the victim's hearsay statements were improperly admitted. The only due process claims raised related to (1) alleged prosecutorial misconduct in failing to provide certain information during discovery, trial objections, and comments on the evidence during closing argument and (2) alleged misconduct by the trial judge by exclusion of petitioner's son from the courtroom, the charge to the jury, and unsubstantiated claims regarding the court's rulings. No question was raised concerning any arguable limits on self-representation. Petitioner's conviction was affirmed by Memorandum Opinion dated March 30, 1983.[1]

On May 3, 1983, petitioner, represented by retained counsel, Honorable Steven D. Yater, sought federal

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[1]Petitioner meanwhile filed, through retained counsel Honorable F. R. Radolovich, a petition for writ of habeas corpus challenging denial of bail pending appeal [USDC, W. D. Ky., No. C82-0349-L(A)]. Mr. Radolovich withdrew after petitioner insisted on filing contradicting *pro se* pleadings. The petition was subsequently denied.

habeas corpus relief under 28 U.S.C. §2254 alleging many of the same errors presented in state court. Again, no question was raised concerning petitioner's ability to represent himself or any constitutional limitations on self-representation. Instead, Wright filed several *pro se* pleadings and moved to act as co-counsel in the federal district court. Following extensive review of the pleadings, the record, and the legal issues raised, the motion to act as co-counsel and the petition for writ of habeas corpus were denied November 14, 1983.

On November 28, 1983, petitioner *pro se* filed a state post-conviction relief motion in the trial court, the denial of which was affirmed by the Court of Appeals of Kentucky on February 15, 1985.

Meanwhile, petitioner appealed to the United States Court of Appeals for the Sixth Circuit through retained counsel, Honorable Russell K. Johnson. Present retained counsel, the Honorable H. Fred Hoefle, was substituted by petitioner shortly before oral argument. Once again, no claim was raised concerning limits on self-representation. After examining the record "with great care," petitioner's claims were rejected on October 17, 1984. It is from this Opinion that petitioner seeks review.

ARGUMENT

I.

Petitioner's Strategic Decisions to Urge Admission of Certain Hearsay Statements and his Failure to Challenge These Waivers Below Preclude Consideration by This Court as to Whether Admission of the Statements Violated Petitioner's Right of Confrontation.

Petitioner claims here he was denied his right of confrontation by admission of testimony concerning the deceased victim's identificatoin of him from a photopak on May 16, 1980; the victim's May 22 statement, questions and answers; the victim's July 15 affidavit setting forth facts of intimidation by Wright; and the July 16 indictment charging Wright with intimidation of a witness.

At the outset it must be noted that Wright did not challenge the July 15 items on confrontation clause grounds below. In the Supreme Court of Kentucky Wright's claim concerning the July 15 affidavit and indictment was characterized in his brief as follows: "The Court Committed Reversible Error When It Admitted Indictment 80CR0735 And The July 15, 1980 Affidavit Of Debra Anderson Into Evidence" (Wright's Brief, p. 10). At the conclusion of this argument Wright generally alleged a denial of due process rights under the Fifth and Fourteenth Amendments (Wright's Brief, p. 12). Neither the Sixth Amendment nor the Confrontation Clause was mentioned in Wright's argument or the opinion of the state court. Accordingly, this Court lacks jurisdiction to consider this claim. 28 U.S.C. §1257(3).

With respect to all of the above-listed statements, each court below found that Wright failed to contemporaneously object and/or affirmatively waived any claims. These findings are supported by at least the following portions of the record. Prior to the beginning of trial, advisory counsel withdrew his motion to exclude identification evidence because the motion conflicted with Wright's "theory of the case and the evidence he wishes to present" (TE 101, pp. 98-99). When the identification evidence was to be introduced, Wright again affirmatively waived his objections (TE 102, pp. 273-277, 279). During his cross-examination of Detective Tangle, Wright launched into a prolonged challenge of the July 15 indictment and the victim's supporting affidavit (TE 95, pp. 246-273). Wright specifically asked that the affidavit be read to the jury (TE 95, pp. 256-257). Wright sought only an admonition, which was given, when the indictment language was read to the jury (TE 95, p. 319). Wright's only objection to the introduction of these documents was that the information was already before the jury (TE 95, pp. 324-325. The victim's May 22 statement, questions and answers were initially discussed by Wright, despite warning by the court and advisory counsel, and were admitted after Wright waived objections (TE 96, pp. 120-123, 129-138, 176-195; TE 99, pp. 68-69, 82, 88).

Wright's allegation he chose this course of action only after the prosecution introduced the victim's excited utterances is totally refuted by his waiver of identification evidence before trial began and by his

repeated strategic assertions that he wanted the jury to know "everything" so they could see how he had been harassed by the police. Wright even came close to injecting into evidence that he was being investigated by the FBI for the murder of Debra Anderson (TE 96, pp. 109-112). In this instance, he wisely followed the advice of counsel and the court and abandoned the subject. Wright had retained counsel prior to his decision to proceed *pro se* and had discussed the case and his strategy with advisory counsel. He must now accept the consequences of his informed decisions. *Murch* v. *Mottram*, 409 U. S. 41 (1972).

Petitioner failed to allege or show any cause for and actual prejudice from his procedural defaults. Accordingly, review in federal habeas proceedings is barred. *Wainwright* v. *Sykes*, 433 U. S. 72 (1977); *Engle* v. *Isaac*, 456 U. S. 107 (1982).

II.

Admission of the Victim's Excited Utterances did not Deny Petitioner's Right to Confrontation.

Petitioner alleges the victim's hearsay statements constituted the "sole evidence of the crime . . . and the sole evidence of his identity as the perpetrator. . . ." He thereby attempts to distinguish other hearsay and confrontation cases.

Respondent respectfully notes that the victim's excited description of the crime and of her unknown attacker were heard by her parents and two police officers as soon as possible and within a few hours of the crime. The apartment manager accompanying

Officer Meyer identified petitioner from the description of Debra Anderson's attacker. Ms. Anderson did not know Mr. Wright and never connected him with the crimes until his picture was included in a seven-person photopak a week later. The emergency room physician described the physical evidence which corroborated the victim's version of the assault and stated the wounds were inconsistent with self-infliction. Petitioner's friend, who was with him near the crime scene earlier that afternoon, testified that Wright was wearing khaki pants and a navy blue shirt that day, the same clothing described by Ms. Anderson. Two acquaintances of Ms. Anderson identified petitioner as the person they saw intimidating Ms. Anderson. A third officer described Wright's strange behavior on July 15 as Wright attempted to establish an alibi for intimidation. Each of these witnesses was available at trial and was cross-examined at length by petitioner. Finally, petitioner volunteered in his statement to the police that he never in his life wore a dark blue shirt and khaki pants, yet he could not explain how he learned these items of clothing were significant. Contrary to petitioner's allegation, respondent submits Wright's conviction was based upon far more than just the victim's hearsay statements.

Turning to Wright's claim of a denial of confrontation, respondent first notes that the unavailability of the witness, due to her prior death, is undisputed. Under these circumstances the purpose of the Confrontation Clause is to augment accuracy.

> "The focus of the Court's concern has been to insure that there 'are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant.' Dutton v. Evans [400 U. S. 74, 89 (1970)] and to 'afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement,' California v. Green, [399 U. S. 149, 161 (1970)]. . . ." *Ohio* v. *Roberts,* 448 U. S. 56, 65 (1980), quoting *Mancusi* v. *Stubbs,* 408 U. S. 204, 213 (1972).

When a hearsay declarant is not present at trial,

> ". . . the Confrontation Clause normally requires a showing that he is unavailable. Even then his statement is admissible only if it bears adequate 'indicia of reliability.' *Reliability can be inferred without more where the evidence falls within a firmly rooted hearsay exception.*" *Ohio* v. *Roberts, supra* at 66. (Emphasis added.)

The victim's statements to her parents and the police at the first opportunity promptly after the crime and while still in an undisputed state of nervous excitement and shock were admitted under Kentucky's *res gestae* or excited utterance exception to the hearsay rule. *Preston* v. *Commonwealth,* Ky., 406 S. W. 2d 398 (1966); *Cook* v. *Commonwealth,* Ky., 351 S. W. 2d 187 (1961); *Curtis* v. *Commonwealth,* Ky., 474 S. W. 2d 394 (1972). This exception is directly comparable to Federal Rule of Evidence 803(2) under which similar "excited utterances" have been admitted and Confron-

tation clause challenges rejected. In *United States* v. *Nick,* 604 F. 2d 1199 (9th Cir. 1979), there was no denial of confrontation by admission of statements of an unavailable three-year-old child to his mother, "Yeah, Eneas [Nick] stuck his tutu in my butt," and that Nick hurt him and made him cry. Nor was confrontation denied by admission of the child's description of the assault to a physician the next day. In *Guthrie* v. *United States,* 207 F. 2d 19 (D. C. Cir. 1953), the court affirmed admission of the deceased victim's statement, "Harry did it," and her description of the assault to police officers who arrived several hours after the crime. See also, *United States* v. *Iron Shell,* 633 F. 2d 77 (8th Cir. 1980), *cert. denied* 450 U. S. 1001.

In the present case, as in the foregoing cases, the indicia of reliability afforded by the victim's shocked and excited state and the corroborating evidence from independent witnesses were more than adequate to protect petitioner's right of confrontation. Accordingly, the petition must be denied.

III.

This Court May Not Consider, on Review of a Habeas Proceeding, the Issue of Possible Limitations on the Right of Self-Representation When the Question Has Never Before Been Raised by Petitioner in State or Federal Court.

Petitioner argues that decisions below noting petitioner's allegations of error were brought about by his own handiwork, in and of themselves, "raised an issue as to whether, and to what extent, the due process

clause permits the conviction of a *pro se* defendant which occurs as the result of his mis-representation" (Petition, p. 11). Petitioner's revealing concession that this issue "has lurked in the background of this case through each stage of the proceedings" demonstrates that no such question was ever presented to or considered by the courts below (Petition, p. 29). Petitioner cannot point to any portion of the record where the question was timely and properly raised so as to give this Court jurisdiction to review.

Had the question been raised in the initial habeas petition, the petition would have been dismissed pursuant to 28 U.S.C. §2254(b). *Rose* v. *Lundy,* 455 U. S. 509 (1982). Kentucky's post-conviction relief procedure through Rule of Criminal Procedure 11.42 provides an adequate mechanism for raising proper constitutional claims or claims that procedural defaults should be excused. *Hollin* v. *Sowders,* 710 F. 2d 264 (6th Cir. 1983); *Alcorn* v. *Smith,* 724 F. 2d 37 (6th Cir. 1983). In urging this Court to consider the question, petitioner flaunts the "simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you have first taken each one to state court." *Rose* v. *Lundy, supra* at 520.

Alternatively, the record in the present case demonstrates that petitioner, like Frank Murch in *Murch* v. *Mottram,* 409 U. S. 41 (1972), was warned and was fully aware of the consequences of his waiver of objections in the trial court. Wright had the assistance of competent advisory counsel and deliberately chose

not to heed counsel's warnings. Wright's conduct at trial and his failure to raise the present claim by post-conviction motion demonstrates a deliberate bypass of state procedures, thus barring habeas corpus relief.

IV.

A State Trial Court is Not Obligated by Due Process to Deny a Defendant's Right to Represent Himself Because the Defendant's Strategy Appears Unwise.

In the event this Court should disagree with respondent's position concerning lack of jurisdiction, the following alternative response on the merits is offered.

Petitioner claims the trial court was obligated to declare a mistrial or otherwise deny him his right to self-representation when Wright announced his strategic decisions to introduce hearsay testimony. Petitioner urges this Court to reconsider its decision in *Faretta* v. *California,* 422 U. S. 806 (1975), and to impose limits upon its holding that a defendant's choice to represent himself must be honored although "he may conduct his own defense ultimately to his own detriment." *Id.* at 834.

Respondent submits that the guidelines of *Faretta* were scrupulously honored in the present case by the appointment of advisory counsel and by repeated inquiries and warnings by the court through trial. Petitioner's conviction was amply supported by admissible evidence and the record fails to support petitioner's allegation that the prosecution obtained a cheap victory through petitioner's blundering and contrary to the obligation that justice be done. Nor does the record

support an inference that the jury was somehow inflamed by petitioner's strategic decisions. For each offense the jury imposed a moderate or minimal sentence. (TR 161-162; Burglary, 13 years; Sodomy, 15 years; Assault, 8 years; Intimidating a Witness, 1 year.) During the persistent felon proceedings where the sentences were enhanced, petitioner was represented by counsel (TR 191-192). The facts of the present case do not provide any basis for reconsideration of *Faretta.*

Moreover, this Court has recently reaffirmed the Sixth Amendment right of self-representation and noted that denial of that right can never be harmless error since the exercise of the right usually increases the likelihood of an unfavorable outcome. *McKaskle* v. *Wiggins,* 465 U. S. —, 79 L. Ed. 2d 122, at 133, n. 8 (1984). This Court reiterated that the primary focus of a challenge to the exercise of *Faretta* rights must be "whether the defendant had a fair chance to present his case in his own way." *Id.* at 132. Petitioner would limit this right to those circumstances in which a trial judge decides, in his discretion, that an accused is not presenting his best possible defense. Any other course of action would, under petitioner's analysis, deny the accused a due process right of "justice."

> "The right to appear pro se exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's best possible defense." *Id.* at 132.

Petitioner here was granted that dignity and autonomy and knows that he cannot now claim his own ineffectiveness as counsel. Wright's attempt to shift to the trial court an obligation to deny self-representation when it is ineffective is an attempt to accomplish indirectly that which cannot be done directly. Wright's claim should be promptly rejected and his petition denied.

CONCLUSION

For all the foregoing reasons, respondent submits William Allen Wright's petition for writ of certiorari must be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Penny R. Warren, counsel for the respondent herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 3rd day of May, 1985, I served the petitioner with Brief for Respondent in Opposition to Petition for Writ of Certiorari by mailing three copies, first-class postage prepaid, to Honorable H. Fred Hoefle, 1010 Second National Building, 830 Main Street, Cincinnati, Ohio 45202, Counsel for Petitioner.

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